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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 286

SUPREME COURT, U.S.
FILED
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STATE OF ALASKA; ROBERT ALLEN VENABLE, executor of the will and estate of R. H. Venable, deceased; and D. D. HARRINGTON,

Petitioners,

vs.

UNITED STATES OF AMERICA, ALASKA EXPLORATION CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT IN REPLY

Brief response to certain points raised in the Brief of the United States in Opposition to the Petition for a Writ of Certiorari is warranted.

1. At pages 4 and 5 of its Brief the United States asserts that the authority of the President to withdraw lands beneath Tustumena Lake so as to prevent vesting of title in the State of Alaska was not questioned below. Quite the contrary, the point was argued in the briefs of both the State and the private petitioners and was further discussed in oral argument

before the Court of Appeals. Indeed, the United States devoted the greater part of its Reply Brief for the Appellant before the Court of Appeals to arguments supporting the validity of the executive order of withdrawal.

2. The United States concedes that the question raised by the Petition has not been considered by the Court previously. It argues that other decisions of this Court are so closely analogous to the question presented here that the matter is settled.

But that is precisely the question. Is the simple declaration by executive order that lands underlying inland navigable waters in a territory shall be used for a certain purpose equivalent to creation of a reservation by treaty, grant or congressional withdrawal, thereby preventing the passage of title to a newly admitted state? If that question is answered affirmatively, the further question is raised whether creation of a wildlife range is the sort of public purpose to which land may be devoted so as to deprive a newly created state of such lands. Petitioner has found, and the United States has cited, no decision of this Court reaching these points.

3. Both the Court of Appeals and the United States seem to assume either that the Kenai Peninsula contains no non-navigable water or that moose require navigable water for their wellbeing. The fact of the matter is that the Kenai Peninsula contains a vast acreage of small ponds and marshes. The portion of the bed of Tustumena Lake accessible to moose is a minute fraction of the total area in question.

The fact that the Court of Appeals and the United States find it necessary to make assumptions regarding the terrain of the Kenai Peninsula and the habitat of the moose clearly shows the erroneous basis of their position. The question is one of title to land and how transfer of that title may have been affected by an act of the executive in 1941. The Court of Appeals and the United States apparently find the controlling issue to be the use to which the land is put—yet no evidence relating to such use was taken. Petitioners suggest that the record is inadequate to support the decision of the Court of Appeals on the basis stated in its Opinion, and that the issues framed by petitioners deserve consideration.

Respectfully submitted,

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